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July 1, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Written *Ex Parte* Presentation in WC Docket No. 06-210

AT&T Corp. ("AT&T") submits this letter concerning recent submissions in the above-captioned docket by the Inga Companies and 800 Services, Inc. ("800 Services"), a company now represented by the same counsel as the Inga Companies that recently filed a document entitled "Request for Declaratory Rulings & Reliance on Comments in Case 06-210" (the "800 Services Declaratory Rulings Request")[1].

As the Commission is aware, the Inga Companies have repeatedly sought to expand the scope of the primary jurisdiction referral from the New Jersey District Court by raising a series of extraneous matters, including the issue of whether AT&T properly imposed certain shortfall charges in 1996 (the so-called "shortfall infliction" or "penalty infliction" claim). The Commission has repeatedly rebuffed these efforts—ruling in 2007 that it would not expand the proceedings beyond the issues the District Court referred[2]; never acting on the Inga Companies' request for reconsideration of that ruling; and terminating a separate declaratory ruling

[1] 800 Services, Inc., Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210, WC Docket No. 06-210 (June 2, 2016).
[2] *See* Order Extending Pleading Cycle, *Combined Companies, Inc. v. AT&T Corp.*, WC Docket No. 06-210 (Jan. 12, 2007)("January 12, 2007 Order").

proceeding that another Inga company (Tips Marketing) filed with respect to the shortfall infliction claim.[3]

Nevertheless, the Inga Companies and 800 Services now claim that they have managed to re-inject the shortfall infliction claim into this proceeding.[4] Specifically, in a "joint comment" dated June 20, 2016, the Inga Companies together with 800 Services assert that because the 800 Services "petition" was submitted "within an existing docket" and AT&T failed to submit a response within 10 days, AT&T is limited to "rely[ing] upon the comments within the 06-210 case pertaining to the penalty infliction issue." *See* Further Support of 800 Services, Inc. Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210, WC Docket No. 06-210, at 2-3 (June 20, 2016). These claims, like so many others raised by the Inga Companies and 800 Services in the past, are procedurally and substantively baseless.

First, AT&T was under no obligation to respond to 800 Service's baseless Request for Declaratory Rulings within 10 days of the filing of that Request. Indeed, in an email dated June 8, 2016, Mr. Alphonse Inga himself acknowledged, on behalf of the Inga Companies, that "[t]he FCC has to first address 800 Services, Inc.'s Declaratory Ruling Requests and let the parties know the scheduling of 800 Services, Inc declaratory ruling requests." *See* Exh. A at 2. More importantly, the FCC's rules expressly provide that, with respect to "a petition for declaratory

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[3] *See* Order, *In the Matter of Termination of Certain Proceedings as Dormant*, CG Docket No. 14-97, 29 FCC Rcd 11017, 11068 (Sept. 15, 2014).

[4] Inexplicably, the Inga Companies have continued to try to inject the shortfall infliction claim in this proceeding even though they have insisted from time to time, in filings before both the Commission and the District Court, that this proceeding is moot.

ruling," the bureau or office to which the petition has been submitted or assigned should "docket such a petition" within an existing or current proceeding where appropriate and "*then* should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a *docketed petition* for declaratory ruling will be *30 days from the release date of the public notice*, and the default filing deadline for any replies will be 15 days thereafter." 47 C.F.R. § 1.2(b) (emphases added).[5] Here, the Commission has given no notice that it has "docketed" the petition 800 Services filed and has not "release[d]" a "public notice" calling for responsive pleadings. Consequently, AT&T was not required to respond to the 800 Service Request within 10 days of its filing and is under no obligation even now to respond.

Second, 800 Services' Request for Declaratory Rulings and its proposal that the three requested rulings be added to Docket 06-210 are wholly inappropriate given the history of this proceeding. In the September 2006 petition that initiated this proceeding, the Inga Companies sought to expand the proceeding beyond the matters that had been referred to include the so-called "penalty infliction" issue. 800 Services supported this improper expansion effort in

[5] The procedural rule that the Inga Companies and 800 Services cite in support of a 10-day response period is inapposite. That rule states that, "[*e*]*xcept as otherwise provided in this chapter*, pleadings in Commission proceedings shall be filed in accordance with the provision of this section," 47 C.F.R. §1.45 (emphasis added), and that, "[w]here specific provisions contained in part 1 conflict with this section, *those specific provisions are controlling*," *id.* Note (emphasis added). Here, another provision of part 1 (*i.e.*, § 1.2(b)) is more "specific" (it addresses petitions for declaratory rulings, whereas § 1.45 addresses pleadings generally, and does not mention petitions for declaratory rulings), and § 1.2(b)'s 30-day response period (measured from the release of a public notice) does "conflict with," and thus takes precedence over, § 1.45's 10-day response rule.

comments submitted dated December 29, 2006. *See* Request for Extension of Time to File Reply Comments, 800 Services, Inc., WC Docket No. 06-210 (Dec. 29, 2006). The Commission, however, refused to expand the proceeding to encompass the so-called "penalty infliction" issue. *See* January 12, 2007 Order. The Inga Companies sought reconsideration of that ruling, and were again supported by 800 Services. *See* 800 Services, Inc.'s Comments Regarding Petitioners Request for Reconsideration and Clarification of the January 12, 2007 FCC Order , WC Docket No. 06-210 (Feb. 12, 2007) ("800 Services Feb. 12 Comments"). The Commission has never granted that relief. Thus, 800 Services' latest Request for Declaratory Rulings in the 06-210 docket is simply a naked and impermissible attempt to override the Commission's prior ruling and obtain the very relief the Commission has declined to grant.[6]

Third, substantial questions exist as to the bona fides of 800 Services' June 2016 Request. 800 Services claims that it "recently discovered the Oct 23rd 1995 Order." 800 Services Declaratory Rulings Request at 2. But over nine years ago, it cited that very order, claiming that AT&T was "under the Oct. 1995 FCC Order not to inflict shortfall charges," and that "800 Services is just discovering that AT&T was in contempt of that Oct. 1995 Order." 800 Services Feb. 12 Comments at 2. Similarly, while 800 Services asserts that it owned pre June 1994 CSTP plans, it presents no evidence to support that claim. More significantly, it fails to disclose that it sued AT&T in 1998 for various claims related to its post-June 1994 CSTP plans, and that Judge

[6] Nor is there any merit to the claim that the issues raised by 800 Services have been fully briefed. Precisely because AT&T argued (successfully) that the shortfall infliction was outside the scope of the referral, AT&T did not address the merits of that claim. That is presumably why the Inga Companies and 800 Services now seek to foreclose AT&T from addressing the merits of their claims.

Politan dismissed all of 800 Services' claims in 2000 and awarded AT&T a judgment of $1.7 million, of which approximately $1.4 million was for unpaid shortfall charges. *See 800 Services, Inc. v. AT&T Corp.* No. 98-1539, (D.N.J Aug. 28, 2000) (attached hereto as Exhibit B). That decision was affirmed by the Third Circuit, *see 800 Services, Inc. v. AT&T Corp.*, 202 U.S. App. LEXIS 2389 (December 7, 2001), and AT&T has not collected anything on the judgment. Given that outcome and the passage of time, 800 Services can have no legitimate interest in any of the three declaratory rulings that it now seeks.

Finally, the fact that Judge Politan found that AT&T was entitled to approximately $1.4 million in shortfall liability relating to a CSTP plan completely belies the Inga Companies' repeated claims that such liability is illusory, and thus did not have to be assumed in writing by a transferee under § 2.1.8 of AT&T Tariff No. 2. Other cases likewise confirm that shortfall liability was not illusory. In 1999, for example, Judge Loretta Preska confirmed a 1998 arbitration award of $26 million which related to shortfall liability incurred in connection with pre-June 1994 CSTP plans. *See AT&T Corp. v. Pub. Serv. Enterprises of PA, Inc. et al.*, No. 98 Civ. 6133, 199 U.S. Dist. LEXIS 13108 (S.D.N.Y. Aug. 24, 1999) (attached hereto as Exhibit C).

In sum, AT&T objects to the institution of any proceeding in response to 800 Services' Request for Declaratory Rulings and, to the extent such a proceeding is instituted, to combining that proceeding with the longstanding proceeding in Docket 06-210. Indeed, because the

Commission indicated in November that an order resolving this proceeding is on circulation,[7] such actions would simply add further delay. If the Commission nevertheless decides to move forward with the Requests, it should establish a schedule pursuant to which each of the three requested rulings would be subject to full briefing.

Sincerely,

/s/ James F. Bendernagel, Jr.
James F. Bendernagel, Jr.
Joseph R. Guerra
Attorneys for AT&T Corp.

Cc: Deena Shetler
Richard Brown
Raymond Grimes

[7] *See* FCC, FCC Items on Circulation, https://transition.fcc.gov/fcc-bin/circ_items.cgi (last visited June 30, 2016).

EXHIBIT A

Brown, Richard H.

From: AL <townnews@optonline.net>
Sent: Wednesday, June 08, 2016 4:25 PM
To: Phillip Okin; 'Phillip Okin'; ray@grimes4law.com; Deena Shetler; Brown, Richard H.
Cc: Ajit.Pai@fcc.gov; Amy.Bender@fcc.gov; ButscheT@dor.state.fl.us; David.Gossett@fcc.gov; Deanne.Erwin@fcc.gov; Deena.Shetler@fcc.gov; DORPTO@dor.state.fl.us; Eddie.Lazarus@fcc.gov; eric.botker@fcc.gov; Jamilla.ferris@fcc.gov; Jane.Halprin@fcc.gov; Jay.Keithley@fcc.gov; Jennifer.Tatel@fcc.gov; Jessica.Rosenworcel@fcc.gov; Jim.Bird@fcc.gov; john.Ingle@fcc.gov; John.Williams2@fcc.gov; Jonathan.Adelstein@fcc.gov; jonathan.sallet@fcc.gov; Julie.Veach@fcc.gov; Karen.onyeue@fcc.gov; Kay.Richman@fcc.gov; KJMWEB@fcc.gov; laynede@dor.state.fl.us; Linda.Oliver@fcc.gov; Madelein.findley@fcc.gov; Matthew.Berry@fcc.gov; MeredithAttwell.Baker@fcc.gov; Michael.Copps@fcc.gov; Mignon.Clyburn@fcc.gov; Mike.ORielly@fcc.gov; Nicholas.Degani@fcc.gov; Pamela.Arluk@fcc.gov; phillo@giantpackage.com; pokin@giantpackaging.com; prosoftwarepack@yahoo.com; PTODirector@dor.state.fl.us; Randolph.Smith@fcc.gov; Richard.Welch@fcc.gov; Robert.McDowell@fcc.gov; robert.ratcliffe@fcc.gov; Sharon.Gillett@fcc.gov; Sharon.Kelley@fcc.gov; Stephanie.Weiner@fcc.gov; Suzanne.Tetreault@fcc.gov; taxviolations@dor.state.fl.us; thomas.wheeler@fcc.gov; Tom.Wheeler@fcc.gov; townnews@optonline.net; Zachary.Katz@fcc.gov
Subject: RE: Deena & AT&T -- Schedule the 800 Services, Inc., Comments...

Deena & AT&T

Your email yesterday to 800 Services, Inc., the Inga Companies and the Florida Department of Revenue states that the FCC will not advise whether or not the FCC will interpret the penalty infliction issues in the Inga Companies-AT&T case.

Mr. Okin's company 800 Services, Inc. is **not** a petitioner within the Inga Companies-AT&T 06-210 case at the FCC. Whether or not the FCC will address the penalty infliction issues in the Inga-AT&T case does not address 800 Services. Inc.'s request for a declaratory rulings.

800 Services, Inc. has requested declaratory rulings and made a motion to address these penalty infliction issues within the o6-210 case. There is no law which requires that Declaratory Ruling requests must emanate from a primary jurisdiction referral from a Court. 800 Services, Inc. has requested its Declaratory Rulings comment period be established and combined with and rely upon the comments in the 06-210 case. 800 Services, Inc. requests a determination before the Inga-AT&T
06-210 case is interpreted by the FCC, so that 800 Services, Inc. will be added to the case as an additional petitioner---so if the FCC decides to interpret the penalty infliction issues 800 Services, Inc. is a named petitioner.

If the FCC can't refuse 800 Services, Inc.'s declaratory Ruling requests on tariff interpretation issues. The three penalty infliction questions are written in a way that addresses tariff interpretation as opposed to fact finding.
The FCC needs to issue a comments period for 800 Services, Inc. and rely upon 10 years of comments on the penalty infliction issues in the Inga-AT&T case.

Due to client confidentiality laws the Florida Department of Revenue can't comment and can't request a Declaratory Ruling.

Judge Wigenton has made it abundantly clear that her Court wants all issues resolved. Judge Bassler's 2006 referral that ended with "all open issues" also seems to mean that his Court wanted all issues resolved. We do understand that the Jan 12th 2007 FCC Order determined that the Judge Bassler question on which obligations transfer under 2.1.8 did not expand the scope of the original 1996 referral on the sole controversy of fraudulent use under 2.2.4. The remaining issues are only the penalty infliction issues.

We can ask Judge Wigenton to either decide: 1) Judge Politan's non-referred determination that the plans were forever immune is the law of the case and an FCC determination is not needed or 2) There needs to be a determination of the penalty infliction issues. If there needs to be a determination of the penalty infliction issues the question then becomes is this a tariff interpretation or a fact based issue. The FCC 2003 Order stated the Inga plans were pre June 17th 1994 but also stated there was a disputed fact as whether the plans would forever be immune. Any disputes under the tariff between AT&T and its customers must by law be determined against AT&T. So it seems that the FCC 2003 Order has already provided Judge Wigenton with the guidance her Court needs to resolve the penalty infliction issues.

We think these penalty infliction issues should be addressed by the NJFDC and so we will file next week a motion to address these issues. Whether or not the traffic could transfer without the plan in Jan 1995 has no impact on a determination as to whether or not AT&T 18 months later in June of 1996 could apply penalties on the Inga Companies plans.

The question today is the FCC's handling of 800 Services, Inc's declaratory ruling requests and adding 800 Services, Inc. as a petitioner in the 06-210 case. The FCC has to first address 800 Services, Inc.'s Declaratory Ruling Requests and let the parties know the scheduling of the 800 Services, Inc declaratory ruling requests or the parties will rely upon the comments already filed. AT&T and the Inga Companies can then decide if it is content with the comments it has already provided that address the issues that determine if the penalty infliction was lawful.

Combine the 800 Services, Inc. DR request case and issue the comments schedule. It would be ridiculous to download all the comments from the 06-210 case and upload the same comments under a different FCC case docket ID.

Thank you

Al Inga
Group Discounts, Inc.

From: Deena Shetler [mailto:Deena.Shetler@fcc.gov]
Sent: Tuesday, June 07, 2016 9:04 AM
To: AL <townnews@optonline.net>; Phillip Okin <pokin@giantpackaging.com>; 'Phillip Okin' <phillo@giantpackage.com>; ButscheT@dor.state.fl.us; taxviolations@dor.state.fl.us; laynede@dor.state.fl.us; DORPTO@dor.state.fl.us; PTODirector@dor.state.fl.us; ray@grimes4law.com
Subject: RE: 800 Services, Inc. Declaratory Ruling Request

The receipt confirmation you receive when you make filings, like the one you attach below, is the confirmation that filings have been received in the record by the agency. I cannot comment on what decisions the Commission will or will not make.

Deena

From: AL [mailto:townnews@optonline.net]
Sent: Tuesday, June 07, 2016 8:59 AM
To: Deena Shetler <Deena.Shetler@fcc.gov>; Phillip Okin <pokin@giantpackaging.com>; 'Phillip Okin' <phillo@giantpackage.com>; ButscheT@dor.state.fl.us; taxviolations@dor.state.fl.us; laynede@dor.state.fl.us; DORPTO@dor.state.fl.us; PTODirector@dor.state.fl.us; ray@grimes4law.com
Subject: FW: 800 Services, Inc. Declaratory Ruling Request

Deena

Please confirm receipt.

800 Services, Inc. requested via email last Friday that the FCC issue declaratory rulings on penalty infliction type of tariff interpretations. 800 Services, Inc.'s DR request has also been uploaded into the 06-210 file and seeks to rely upon the comments and evidence supplied by AT&T and the Inga companies on these issues.

My counsel Ray Grimes is contacting AT&T counsel Richard Brown to advise AT&T of 800 Services, Inc.'s FCC Declaratory Ruling requests. AT&T can decide if it wishes to supplement its FCC comments on these penalty infliction issues that have already been briefed. Given the fact that AT&T's recent briefs to Judge Wigenton that the FCC should resolve all these issues we do not see AT&T opposing the FCC interpreting the penalty infliction issues.

Deena we would like the FCC to advise 800 Services, AT&T and the Inga companies if the FCC will resolve the penalty infliction issues relying upon the 06-210 comments. The Inga Companies have also requested these same declaratory rulings and the FCC has stated that it will not advise AT&T or the Inga Companies whether the FCC will issue a ruling on these issues.

If there is no acknowledgement by the FCC that it will rule on these issues we will advise Judge Wigenton and request her Court to issue primary jurisdiction referrals on these issues. Based upon Judge Wigenton's last decision we believe she wants all issues resolved by the FCC.

Thank you
Al Inga
Group Discounts, Inc.

Your submission has been accepted

ECFS Filing Receipt - Confirmation number: 201667110687

Proceeding

Name	Subject
06-210	Comment sought on request for Declaratory Rulings Pleading Cycle Established

Contact Info

Name of Filer:	800 Services, Inc
Email Address:	ray@grimes4law.com
Attorney/Author Name:	Ray Grimes
Lawfirm Name (required if represented by counsel):	Ray Grimes

Address

Address For:	Law Firm
Address Line 1:	1367 U.S. 202 North
City:	Branchburg
State:	NEW JERSEY
Zip:	08853

Details

Type of Filing: MOTION

Document(s)

File Name	Custom Description
800 Services, Inc. Declaratory Ruling Request.docx	800 Services, Inc. Request for Declaratory Rulings and Motion and to rely upon the comments in the

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http://apps.fcc.gov/ecfs/comment/confirm?confirmation=201667110687
For any problems please contact the Help Desk at 202-418-0193.

800 Services, Inc.'s president Phil Okin had a declaratory ruling request filed on Friday seeking the FCC to interpret issues having to do with penalty infliction. These penalty infliction issues were also requested by my companies to be resolved and Deena Shetler advised petitioners that the FCC does not advise the parties what the FCC will interpret.

800 Services, Inc. has requested that its declaratory ruling be combined with my companies 06-210 case due to the fact that AT&T and the Inga companies have made substantial comments regarding AT&T's interpretation of the June 17th 1994 discontinuation w/o liability provision. We have also made substantial comments on the illegal billing remedy and the Oct 23rd 1995 FCC Order which ordered AT&T to maintain the pre June 17th 1994 terms and conditions.

Given the fact that these penalty infliction issues have been substantially briefed due in large part to the open ended referral from Judge Bassler in 2006 my company does not plan on

making any additional comments. If AT&T would like to add additional comments that is fine and my company will respond.

Given the fact that my company is the petitioner and this may delay the issuance of an FCC ruling the FCC should decide whether there needs to be one FCC order with all issues resolved or separate FCC Orders. It would make the most sense to combine all FCC Rulings into one FCC order.

The DC Circuit and the FCC Counsel during DC Circuit Oral argument in the traffic only transfer case commented that the issue of whether there would be shortfall on the plans in the first place was never interpreted by the FCC. The June 17th 1994 provision is obviously before the Jan 1995 traffic only transfer. AT&T knew it had no merit to raise its sole defense of fraudulent use under 2.2.4 of its tariff---claiming that merely suspecting being defrauded over shortfall charges, gave it the ability to permanently deny the traffic only transfer. AT&T knew in Jan 1995 that its sole defense of fraudulent use had no merit but asserted it anyway.

Also copied here is Thomas Butscher esq. who is counsel for the Florida Department of Revenue and other Florida Department of Revenue staff. There is still an open case in Florida Department of Revenue regarding AT&T's position to Judge Bassler and the FCC that AT&T was "compensated in a form other than cash" by Florida company CCI, for the $80 million in charges that AT&T inflicted. AT&T was compensated by CCI's president Larry Shipp in a form other than cash by agreeing in the CCI-AT&T settlement agreement to AT&T in its continued defense against the Inga Companies claims. AT&T conceded in its FCC comments that AT&T was compensated on the $80 million but never paid Florida taxes on the $80 million. Florida law mandates that whether the carrier was paid in cash or some other form of compensation the carrier must pay the taxes. AT&T claimed that although it failed to pay taxes it doesn't owe the taxes now due to statute of limitations. Florida counsel response to that AT&T position was to point out the Florida law that willful non-paying of taxes and burying the transaction in the AT&T-CCI settlement agreement is an action that has **no** statute of limitation. The issue Florida Department of Revenue still has yet to get determined by the FCC is whether or not the $80 million should have been applied in the first place.

Besides Mr Okin and Florida and my companies there are several other AT&T aggregators that have provided certifications that my company filed with the FCC within the FCC 06-210 case. None of these companies was aware of the FCC Oct 23rd 1995 Order mandating AT&T continue to grandfather the pre June 17th 1994 plans under the discontinuation w/o liability provision. **By law these companies have 2 years from discovery of evidence to bring a complaint so they all have already or will soon notify their District Courts that the FCC is interpreting an issue that was recently discovered.**

The Inga companies are filing a reconsideration with the NJFDC asking the Court to CLAIRIFY IN LAYMANS TERMS THE FCC JAN 12th 2007 ORDER. As the FCC has seen Judge Wigenton incredibly did not even mention this FCC Order in her Court's recent Decision. Her Court's position was that Judge Bassler's referral was to be interpreted and the FCC

obviously was stating it "did not expand the scope" of the original 1996 Third Circuit Referral—thus the Judge Bassler issue on which obligations transfer on a 2.1.8 traffic only transfer is moot. We will ask Judge Wigenton to send an order to simply make explicit the Jan 12th 2007 FCC Order. This way Judge Wigenton will understand why the FCC has not ruled on Judge Bassler's obligation allocation referral for 10 years. The FCC needs to simply clarify that the reason why there was no FCC decision was not Judge Wigenton's apparent belief that the FCC staff is simply lazy and requires a DC Circuit mandamus and just hasn't gotten around to it in 10 years---but the FCC actually **tried to advise the District Court that Judge Bassler's obligation question was moot--**but the FCC Jan 12th 2007 Order written by Deena Shetler was not understood.

Petitioners have also filed a motion for an FCC bureau level reissuance of the Jan 12th 2007 FCC Order---this time in explicit English.

Petitioners will file next week a motion with the NJFDC requesting that Judge Wigenton issue an order to make the FCC Jan 12th 2007 Order explicit. For Judge Wigenton to not even comment on that FCC Order clearly demonstrates that her Court was also confused by it. Petitioners spent years commenting on which obligations transfer under 2.1.8 until the FCC 2007 Order was understood that the obligations allocation question of Judge Bassler was not going to be interpreted by the FCC as it was outside the scope of the 1996 referral.

The FCC's 2007 Order was basically advising AT&T that its new 2.1.8 defense created in Judge Bassler's Court in 2006 could not be its justification why it denied the traffic only transfer in 1995—common sense!

Thank you for your valuable time!

Al Inga
Group Discount, Inc.

EXHIBIT B

CLOSED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
NICHOLAS H. POLITAN
DISTRICT JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST, ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

August 28, 2000

THE ORIGINAL OF THIS LETTER OPINION
IS ON FILE WITH THE CLERK OF THE COURT

John J. Murray, Jr., Esq.
LAW OFFICES OF LAWRENCE S. COVEN
314 U.S. Highway #22 West
Suite E
Green Brook, NJ 08812
Attorneys for Plaintiff

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Frederick L. Whitmer, Esq.
Richard H. Brown, Esq.
PITNEY, HARDIN, KIPP & SZUCH
P.O. Box 1945
Morristown, NJ 07962-1945
Attorneys for Defendant

Re: 800 Services, Inc.
v. AT&T Corp.
Civil Action No. 98-1539 (NHP)

Dear Counsel:

This matter comes before the Court on the motion by defendant AT&T Corporation for summary judgment with respect to

A1

the remaining counts of plaintiff 800 Services's Complaint.[1] The Court heard oral argument on February 29, 2000 and April 17, 2000. For the reasons stated herein, the motion by defendant AT&T Corporation for summary judgment is **GRANTED** and the remaining counts of plaintiff's Complaint are hereby **DISMISSED WITH PREJUDICE**. Furthermore, AT&T Corporation is entitled to judgment on its counterclaim in the amount of $1,782,649.60 plus pre-judgment interest. Accordingly, this case is **CLOSED**.

BACKGROUND

Plaintiff 800 Services (hereinafter "800 Services"), a corporation organized under the laws of the State of New Jersey, was engaged in the telecommunications business as an "aggregator" of defendant AT&T Corporation's "800" telecommunications services. See Complaint, ¶¶1, 5-9. As an aggregator, 800 Services subscribed to certain AT&T high-volume discount plans and pooled the usage of its customers to satisfy the minimum volume commitments of the AT&T service plan. See id. 800 Services owned no telecommunications facilities of its own and was AT&T's customer of record for the services to which it subscribed. See id. In turn, the customers whose usage 800

[1] Counts 1, 2, 3, and 10 of 800 Services's Complaint have previously been dismissed. See Stipulation of Dismissal and Order dated February 5, 1999; Order dated August 12, 1999.

Services aggregated were direct customers of 800 Services, not of AT&T. See id., ¶10.

Defendant AT&T Corporation (hereinafter "AT&T") provides interstate long-distance telecommunications service in competition with MCI, Sprint, and many other long-distance carriers and is a "common carrier" within the meaning of the federal Communications Act of 1934.

Interstate telecommunications carriers are regulated by the ("FCC") pursuant to Title II of the Communications Act of 1934, as amended. See 47 U.S.C. § 201, et seq. (West 2000). Because AT&T provides long distance telecommunications services as a "common carrier" it falls within the purview of the Communications Act. See 47 U.S.C. § 153(10)[2]; 47 U.S.C. § 201, et seq. (West 2000). As such, it is required to provide its services to any person upon reasonable request on terms that are just, reasonable, and nondiscriminatory. See 47 U.S.C. § 201; 47

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[2] According to the Act,

> The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter, but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(10) (West 2000).

U.S.C. § 202(a) (West 2000).

The duties owed by common carriers are regulated through tariffs. Pursuant to § 203, a common carrier such as AT&T, is required to file "schedules" with the FCC, commonly referred to as "tariffs," "showing all charges" for its services and "the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a) (West 2000). See also MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D.N.J. 1995). Once the tariffs have been filed and permitted by the FCC to become effective, the common carrier is precluded by statute from deviating from the terms of its filed tariffs. According to the statute: "[no] carrier shall . . . extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c) (West 2000). Thus, pursuant to the "filed rate doctrine/filed tariff doctrine," the filed rates are binding on both the carrier and the public. See Marco Supply Co. v. AT&T, 875 F.2d 434, 436 (4th Cir. 1989) (citations omitted). See also See Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 488 (2d Cir. 1998); MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D.N.J. 1995). Despite the fact that strict adherence to the filed rate/filed tariff doctrine oftentimes produces harsh results, it is the operative doctrine

to be applied by the courts. See Fax Telecommunicaciones, Inc. v. AT&T, 952 F. Supp. 946 (E.D.N.Y. 1996), aff'd, 138 F.3d 479 (2d Cir. 1998).

In 1991, the FCC adopted rules and regulations authorizing carriers to establish "contract tariffs" with their customers. See Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 482 (2d Cir. 1998) (citing In the Matter of Competition in the Interstate Interexchange Marketplace, 6 F.C.C.R. 5880 (1991) (hereinafter "Interstate Interexchange Marketplace"); on reconsideration, 6 F.C.C.R. 7569 (1991); on further reconsideration, 7 F.C.C.R. 2677 (1992), on further reconsideration, 10 F.C.C.R. 4562 (1995)). A contract tariff contains individually negotiated and tailored services arrangements reached between a common carrier and its customer. See Telecom International America, Ltd. v. AT&T Corp., 67 F. Supp.2d 189, 196 n.4 (S.D.N.Y. 1999); National Communications Association, Inc. v. American Telephone & Telegraph Co., No. 92 Civ. 1735, 1998 WL 118174 *27 n.31 (S.D.N.Y. March 16, 1998). The rules and regulations surrounding contract tariffs were designed to "increase flexibility for customers and promote competition among carriers." Fax Telecommunicaciones, 138 F.3d at 482.

In Fax Telecommunicaciones, the United States Court of Appeals for the Second Circuit explained the process whereby contract tariffs become effective. First, "[a]t least one

customer must enter into a contract with the carrier pursuant to the new tariff in order for the carrier to file the contract tariff." Id. (citing 47 C.F.R. § 61.3(m)). Furthermore, the contract tariff must be filed at least fourteen days prior to the effective date of the contract and must include "the terms of the contract, a description of the services to be provided, the price for these services, the minimum volume commitments for each service, any volume discounts, as well as other classifications, practices, and regulations affecting the contract rate thereby complying with the filing requirements of 47 U.S.C. §203(a)." Id. (citing Interstate Interexchange Marketplace at ¶¶91, 121, 122). Upon expiration of the fourteen days, the contract tariff is effective so long as neither the FCC nor any member of the public objects. Id. (citing 47 C.F.R. §§ 61.58(c)(6), 61.42(c)(8)). Finally, in order not to violate the Act's prohibition against discrimination, the carrier must then make the contract tariff generally available to other similarly situated customers. See id. (citing Interstate Interexchange Marketplace at ¶¶91, 129).

In this matter, pursuant to Tariff No. 2, AT&T offered "inbound" or "800" long-distance telecommunications services and certain discount plans for such services, including "Customer Specific Term Plan II" (hereinafter "CSTP II"). AT&T's CSTP II Plan, as set forth in Tariff No. 2, provided for discounted rates and associated promotional discounts and credits in return for a

commitment by the customer to satisfy an annual Minimum Revenue Commitment for the term of the subscription. See Certification of Daniel H. Solomon, Exhibit C. A customer subscribes to AT&T's CSTP II Plan by executing a Network Services Commitment Form. Under the tariff, AT&T bills the aggregator's individual locations for their portion of the usage under the plan. However, Tariff No. 2 provides that AT&T's customer of record (the aggregator in this case) assumes all financial responsibility for all of the designated accounts aggregated under the customer's CSTP II Plan and that, in the event any of these accounts is in default of payment, AT&T will reduce the plan discount payable to the AT&T customer in the amount of that default. See id., Tariff No. 2, §3.3.1.Q.

Tariff No. 2 further provides that the customer will incur "shortfall" charges in the event that it does not satisfy its Minimum Revenue Commitment and "termination" charges if it discontinues service before the completion of the term. See id. Tariff No. 2 also provides that, in the event any shortfall or termination charges are incurred under a CSTP II Plan, such charges shall be apportioned among the accounts aggregated under the plan according to usage and billed to the individual aggregated locations designated by the customer. See id.

STATEMENT OF FACTS

800 Services subscribed to inbound service offered by AT&T pursuant to Tariff No. 2 from 1990 through 1994. However, the allegations of the Complaint concern service to which 800 Services subscribed after August 1, 1994.

On or about July 22, 1994, Phillip Okin (hereinafter "Okin"), President of 800 Services, executed a Network Services Commitment Form for AT&T's CSTP II Plan. See Certification of Daniel H. Solomon, Exhibit D. This form expressly provides:

> [t]he service(s) and pricing plan(s) you have selected will be governed by the rates and terms and conditions in the appropriate AT&T tariffs as may be modified from time to time. Your signature acknowledges that you understand the terms and conditions under which the service(s) selected will be provided and that you are duly authorized to make the commitment(s) and to order service for each of these locations.

See id.

On August 2, 1994, Scott Landon, on behalf of AT&T, executed the Network Services Commitment Form. See id. Pursuant to this subscription, 800 Services agreed to an annual Minimum Revenue Commitment of $3 million in services per year for three years. The effective date of this subscription was August 1, 1994. See id.

During his deposition, Okin testified that, in or about Fall 1994, his business began declining. See Deposition of Phillip Okin at page 50, lines 11-13. In or about November to December

1994, 800 Services discontinued adding new customers to its CSTP Plan. See Okin Dep. at page 144, lines 5-11.

At some point shortly thereafter, 800 Services was unable to meet its minimum revenue commitment under its CSTP Plan for the first year of the third-year term. See Okin Dep. at page 139, lines 1-11. The record reveals that Okin then embarked upon a series of "strategies" seemingly aimed at avoiding the shortfall charges which, incidentally, Okin believed he did not have to pay. See Okin Dep. at page 166, lines 3-10. The first strategy was to request that AT&T extend the term of its commitment under its August 1, 1994 plan pursuant to Section 2.5.7 of Tariff No. 2.[3] See Solomon Cert., Exhibit F. 800 Services asserted that it qualified for an extension under the terms of the tariff because AT&T's implementation of an FCC order (which placed a quota on the number of new "800" numbers available to each carrier on a weekly basis) prevented 800 Services from satisfying its minimum revenue commitment. See id.

In responding to Okin's request in a letter dated July 14, 1995, AT&T noted that 800 Services did not show a "cause and affect [sic] relationship between the governmental order that constrains the supply of 800 numbers and 800 Services, Inc.'s

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[3] Section 2.5.7 of Tariff No. 2 permits a customer to extend the original term commitment of its tariffed volume discount plan for up to one year if the customer fails or is unable to meet its usage or revenue commitment because of a strike, government order or other such circumstances. See Solomon Cert., Exhibit C.

failure to meet its tariff commitments." See Solomon Cert., Exhibit G. AT&T then requested 800 Services to demonstrate that it already has activated or had firm end-user customer orders to activate all of its currently reserved numbers and that it had firm orders for 800 services from end-user customers under its CSTP II Plan that could not be satisfied due to the unavailability of new numbers. See id. 800 Services submitted no proof to AT&T that it already had activated all of its currently reserved numbers and had firm orders for additional service that could not be met due to the implementation of the FCC quota. See Okin Dep. at 93, line 25; page 94, lines 1-10. In fact, Okin testified that no 800 Services order went unfulfilled because of the FCC "800 number" quota. See Okin Dep. at page 93, lines 17-24.

In or about July 21, 1995, 800 Services then attempted to "restructure" its CSTP II Plan. By letter dated July 25, 1995, AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. See Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum

Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. See id. AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. See id. 800 Services never attempted to proceed with this request. See Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. See Okin Dep. at page 134, lines 7-11.

800 Services next contemplated moving certain business traffic from its Tariff No. 2 service to CT 516. Notwithstanding 800 Services's allegations in its Complaint, 800 Services has admitted in discovery that it did not qualify to subscribe directly to CT 516 and that 800 Services never actually submitted an order to AT&T for service to CT 516 or under any other contract tariff or to transfer service from Tariff No. 2 to CT 516. See Okin Dep. at pages 101-105.

Finally, in or around July 28, 1995, 800 Services submitted orders to AT&T to delete all its end-user locations from its CSTP II Plan. See Okin Dep. at page 104. At the time that 800 Services asked to delete all its customers from its plan, 800 Services had no arrangements to transition those customers to any other 800 Services's plan or to any other telecommunications service for inbound 800 service. See Okin Dep., at page 157,

lines 14-22; page 158, lines 22-25; page 159, line 1.

On or about April 1, 1996, AT&T rendered a bill to 800 Services in the amount of $382,651.05 allegedly due and owing for usage charges for inbound telecommunications services provided to 800 Services by AT&T pursuant to Tariff No. 2. See Certification of Naris Sotillo-Sayers, ¶6. In or about May 1, 1996, AT&T rendered a bill to 800 Services in the amount of $1,399,998.68 reflecting the amount allegedly due and owing for shortfall and termination charges because of 800 Services's alleged failure to fulfill the Minimum Revenue Commitment under its CSTP II plan. See id., ¶17. AT&T contends that 800 Services never paid any money to AT&T in satisfaction of the aforementioned bills and that said amounts remain due and owing.

On April 6, 1998, 800 Services filed a Complaint in the United States District Court for the District of New Jersey containing twelve counts.

On June 30, 1998, AT&T filed an Answer and Counterclaim.

DISCUSSION

I. Standard of Review

The standard governing a summary judgment motion is set forth in Fed. R. Civ. P. 56(c), which provides, in pertinent part, that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(C) (West 2000). A fact is material if it might affect the outcome of the suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Procedurally, the movant has the initial burden of identifying evidence that it believes shows an absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the movant will bear the burden of proof at trial, the movant's burden can be discharged by showing that there is an absence of evidence to support the non-movant's case. See id. at 325. If the movant establishes the absence of a genuine issue of material fact, the burden shifts to the non-movant to do more than "simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In this matter, there are no genuine issues of material fact and therefore, summary judgment is appropriate.

II. Communications Act

Counts Eleven and Twelve of 800 Services's Complaint purport to allege claims arising under §§ 201, 202, and 203 of the Communications Act.

The limitations period governing such claims is found in Section 415(b) of the Act which provides, in pertinent part:

"[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d)[4] of this section." 47 U.S.C. §415(b) (West 2000). This section applies equally to complaints brought in a court of law in addition to those claims filed with the FCC. See Pavlak v. Church, 727 F.2d 1425, 1426-27 (9th Cir. 1984); Ward v. Northern Ohio Tel. Co., 381 F.2d 16 (6th Cir. 1967).

800 Services filed the subject Complaint on April 6, 1998 essentially alleging that AT&T engaged in various violations of the common law and the Communications Act during a period of time beginning in September 1990 and ending no later than July 1995. The service upon which plaintiff bases its Complaint commenced on August 2, 1994, see Complaint, ¶6, and the latest alleged misdeed

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[4] Section 415(d), which provides:

> If on or before expiration of the period of limitation in subsection (b) or (c) of this section a carrier begins action under subsection (a) of this section for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

47 U.S.C. §415(d) (West 2000).

Incidentally, there is no dispute that, based on the facts of this case, this provision does not apply.

by AT&T occurred no later than July 1995 when 800 Services requested that its accounts be deleted, see Complaint, ¶16, and claims that it later requested transfer to CT 516, see Complaint, ¶21. Based on plaintiff's allegations, the most recent violation occurred no later than July 1995, which is more than two years prior to the filing of the Complaint.

In response, 800 Services contends that its claims brought pursuant to the Communications Act are not time-barred by the applicable two-year statute of limitations by virtue of the "continuing wrong" doctrine.

The "continuing wrong" doctrine applies in situations where there is evidence of continuing **affirmative** wrongful conduct. See 287 Corporate Center Associates v. Township of Bridgewater, 101 F.3d 320, 324 (3d Cir. 1996) (citing Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1296 (3d Cir. 1991) (emphasis added)). 800 Services has failed to allege any facts or establish through discovery any evidence that AT&T's alleged wrongful conduct giving rise to the Communications Act claims continued beyond the limitations period. 800 Services merely contends that because AT&T "continues to be unjustly enriched at plaintiff's expense," the continuing wrong doctrine should apply. As stated above, however, the continuing wrong doctrine applies to an affirmative act by the alleged wrongdoer and continuing to be "unjustly enriched" does not qualify as an

affirmative act. Instead, if one becomes "unjustly enriched" it is, most likely, the **result** of an affirmative wrongful act. Because there is no evidence in the record of an affirmative act of wrongdoing by AT&T beyond July 1995, 800 Services's claims in **COUNTS ELEVEN AND TWELVE** of the Complaint for violation of the Communications Act are **DISMISSED WITH PREJUDICE** inasmuch as they are time-barred.

III. Slander and Libel

Counts Five and Six of 800 Services's Complaint purport to allege claims of slander and libel.

N.J.S.A. §2A::14-3 provides:

> Every action at law for libel or slander shall be commenced within 1 year next after publication of the alleged libel or slander.

N.J. STAT. ANN. §2A:14-3 (West 2000).

The latest point in time within which it is alleged that AT&T made slanderous or libelous statements is July 1995. As noted above, plaintiff filed the subject Complaint on April 6, 1998, well over one year after the slanderous and libelous statements allegedly were made by representatives of AT&T. Therefore, **COUNTS FIVE AND SIX** of the Complaint are **DISMISSED WITH PREJUDICE** inasmuch as they are time-barred.

IV. Unjust Enrichment

Count Four of 800 Services's Complaint purports to allege a claim of unjust enrichment. 800 Services contends that AT&T became unjustly enriched at its expense when AT&T utilized 800 Services's proprietary customer lists to derive profits without apportioning the profits. 800 Services also alleges that AT&T wrongfully collected revenue from end-user customers without giving 800 Services its share of the profits.

To state a claim for unjust enrichment, a plaintiff must show "both that defendant received a benefit and that retention of that benefit without repayment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (citing Associates Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (N.J. Super. Ct. App. Div. 1986); Russell-Stanley Corp. v. Plant Indus., Inc., 250 N.J. Super. 478, 509-510 (N.J. Super. Ct. Ch. Div. 1991)). A plaintiff must show "that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of the remuneration enriched defendant beyond its contractual rights." VRG Corp., 135 N.J. at 555.

The deposition testimony submitted by counsel for 800 Services does not support its allegation that AT&T used proprietary information belonging to 800 Services. Quite simply, there is no first-party testimony that AT&T appropriated 800

Services customers. For example, Okin's testimony reeks with statements amounting to nothing more than mere conjecture. A thorough review of Okin's testimony reveals that he simply made assumptions about AT&T's actions when his business traffic began to decline. In fact, Okin admits that none of the customers who left 800 Services ever advised him that they left as a result of being contacted by AT&T.

Additionally, contrary to what 800 Services would have this Court believe, nothing in Chris Mehlenbacher or Susan Rinaldi's (employees of 800 Services) deposition testimony provides a factual basis for 800 Services's conclusion that AT&T was utilizing its proprietary information. In fact, when questioned about what he knew about a claim that AT&T was misusing plaintiff's proprietary information, Mr. Mehlenbacher testified that: "[i]t was just, let's call it a general buzz in the aggregator industry that they felt that their accounts were being targeted specifically. I don't have a specific conversation that took place." See Deposition of Chris Mehlenbacher at page 89, lines 1-5. Finally, Al Inga's (another aggregator) testimony is based on what information he was given by Okin and other aggregators in the industry. See Deposition of Al Inga at page 32, lines 7-14; page 112-113. See also Okin Dep. at page 244, lines 12-24.

800 Services also alleges that AT&T wrongfully collected

revenue from end-user customers without giving 800 Services its share of the profits. However, 800 Services offers no evidence to support this allegation. Therefore, **COUNT FOUR** of the Complaint is **DISMISSED WITH PREJUDICE.**

V. Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contractual Relations

Counts Seven and Eight of 800 Services's Complaint purport to allege claims of intentional interference with prospective economic advantage and intentional interference with contractual relations.

"An action for tortious interference with prospective business relation protects the right 'to pursue one's business, calling or occupation free from undue influence or molestation.'" Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 750 (1989). "What is actionable is '[t]he luring away, by devious, improper, and unrighteous means, of the customer of another.'" Id.

"The separate cause of action for the intentional interference with a prospective contractual or economic relationship has long been recognized as distinct from the tort of interference with the performance of a contract." Id. (citations omitted). Pursuant to New Jersey law, the elements of

a claim for tortious interference with contract are: "(1) a plaintiff's existing or reasonable expectation of economic advantage or benefit; (2) a defendant's knowledge of the plaintiff's expectancy by the defendant; (3) wrongful and intentional interference with that expectancy by the defendant; (4) a reasonable probability that the plaintiff would have received the anticipated economic advantage absent such interference; and (5) damages resulting from the defendant's interference." Pitak v. Bell Atlantic Network SVCS, Inc., et al., 928 F. Supp. 1354, 1369 (D.N.J. 1996) (citations omitted). Clearly, the linchpin of the analysis is the "wrongfulness" of the actions.

800 Services contends that AT&T wrongfully solicited 800 Services's customers, thereby causing 800 Services's business to decline. Specifically, 800 Services contends that AT&T called 800 Services's customers, offered lower rates than those offered by 800 Services, and told these customers that it would remove any shortfall charges assessed to them if they would switch to AT&T. 800 Services also contends that AT&T tortiously interfered with its business when AT&T refused to allow 800 Services to restructure its plan.[5]

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[5]800 Services proffers many allegations to support its tortious interference claims. However, many of these allegations should have been asserted pursuant to the Communications Act. Since the Court has already determined that any claims brought pursuant to the Communications Act are time-barred, the Court will not

As aforementioned, there is no reliable, first-party testimony in the record that AT&T wrongfully solicited 800 Services's customers. Even assuming that AT&T contacted 800 Services's customers and advised those customers that AT&T disconnected 800 Services, that a customer could complete calls on the AT&T network at AT&T's standard rates, that a customer may also choose any long-distance carrier, and that a customer may want to consider direct service with AT&T as an alternative to no service at all (since Okin testified that there was no alternative plan in place post-deletion), such conduct does not strike this Court as "wrongful" conduct on the part of AT&T. This is because these statements allegedly occurred after 800 Services began defaulting on its payment obligations and, ultimately, placed these customers in the position of having no 800 service plan at all.

Further, 800 Services's allegation that AT&T wrongfully refused its request to restructure is belied by the testimony if its President. The record reveals that AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. See Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if

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address these allegations.

800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. See id. AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. See id. 800 Services never attempted to proceed with this request. See Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. See Okin Dep. at page 134, lines 7-11. Therefore, **COUNTS SEVEN** and **EIGHT** of the Complaint are **DISMISSED WITH PREJUDICE.**

VI. Unfair Competition/Trade Libel

Count Nine of 800 Services's Complaint purports to allege claims of unfair competition/trade libel.

In order to prove the tort of trade libel, a plaintiff must establish "the publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business." Federal Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 871 (3d Cir. 1994) (citing Henry v. Vaccaro Const. Co. v. A.J. DePace, Inc., 137 N.J. Super. 512 (Law Div. 1975)).

800 Services argues that AT&T told 800 Services's customers that 800 Services was "not responsible in their business matters." See 800 Services's Supplemental Brief at page 11. To support this proposition, 800 Services relies on the testimony of Susan Rinaldi, one of its employees. Contrary to 800 Services's characterization of that testimony, Susan Rinaldi testified that in connection with a discussion of why AT&T allocated shortfall charges to end-user locations, an employee of AT&T named "Vanessa" said: "we told the customers because 800 Services didn't meet their requirement that they're being charged back a penalty." See Deposition of Susan Rinaldi at page 145, lines 1-12. As pointed out by counsel for AT&T, the "requirement" referenced therein is the Minimum Annual Commitment in the tariff which, if not met, gives rise to the imposition of shortfall charges. 800 Services does not dispute that it did not meet the Minimum Annual Commitment and, accordingly, shortfall charges may issue.

In conclusion, 800 Services has not offered any admissible evidence which demonstrates that AT&T made false statements concerning 800 Services, its property or business. Therefore, **COUNT NINE** of the Complaint is **DISMISSED WITH PREJUDICE.**

VII. AT&T's Counterclaim

AT&T has filed a Counterclaim seeking judgment for unpaid usage charges in the amount of $382,651.05 and shortfall charges in the amount of $1,399,998.68 plus pre-judgment interest.

As discussed in greater detail above, the filed tariff controls the parties' rights and liabilities as a matter of law. In this matter, Tariff No. 2 provides that the payment of invoices is due upon presentation. See Certification of Daniel H. Solomon, Exhibit C, Tariff No. 2 § 2.5.3. Pursuant to Tariff No. 2, 800 Services, as a subscriber to AT&T services pursuant to the tariff, is obligated to pay all usage charges accrued for services rendered. Additionally, 800 Services is responsible for shortfall and termination charges in the event that 800 Services fails to satisfy the minimum usage commitments. 800 Services has not submitted payment for any of these charges. The prevailing law entitles AT&T to judgment for these charges.

AT&T has submitted a Certification by Noris Sotillo-Sayers dated December 10, 1999 which certifies that these are the amounts due and owing to AT&T as a result of services provided to 800 Services under the CSTP II Plan. Although 800 Services has contested that it must pay these charges, it does not challenge the amounts as set forth in the Certification.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

800 SERVICES, INC.,	:	CIVIL ACTION NO. 98-1539
Plaintiff,	:	HON. NICHOLAS H. POLITAN
v.	:	**FINAL ORDER**
AT&T CORP.,	:	
Defendant.	:	

THIS MATTER having come before the Court on the motion by defendant AT&T Corporation for summary judgment with respect to the remaining counts of plaintiff 800 Services's Complaint; and the Court having heard oral argument on February 29, 2000 and April 17, 2000; and upon careful consideration of all memoranda submitted in connection with said motion; and for the reasons set forth more particularly in the Letter Opinion which accompanies this Order; and good cause having been shown,

IT IS on this 28th day of August, 2000,

ORDERED that the motion by defendant AT&T Corporation for summary judgment is **GRANTED** and the remaining counts of plaintiff's Complaint are hereby **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that AT&T Corporation is entitled to judgment on its counterclaim in the amount of $1,782,649.60 plus pre-judgment interest; and it is further

ORDERED that this case is **CLOSED**.

NICHOLAS H. POLITAN
U.S.D.J.

CLOSED

FILED

SEP 18 2000

AT 8:30 ..... M
WILLIAM T. WALSH
CLERK

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U.S. DISTRICT COURT
DISTRICT OF NEW JERSEY

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PITNEY, HARDIN, KIPP & SZUCH LLP
(MAIL TO) P.O. BOX 1945, MORRISTOWN, N.J. 07962-1945
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ATTORNEYS FOR Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

800 SERVICES, INC.,	:	Hon. Nicholas H. Politan, U.S.D.J.
Plaintiff,	:	
v.	:	Civil Action No. 98-1539
AT&T CORP.,	:	FINAL JUDGMENT
Defendant.	:	
	:	

WHEREAS the Court entered a Final Order in this action on August 28, 2000 directing the entry of a final judgment in favor of defendant AT&T Corp. on its claim against plaintiff 800 Services, Inc. in the amount of $1,782,649.60, plus prejudgment interest from June 1, 1996 through August 28, 2000; and

ENTERED
ON DOCKET
SEP 20 2000
WILLIAM T. WALSH, CLERK
By A. Angelis
(Deputy Clerk)

WHEREAS the prejudgment interest (calculated pursuant to 28 U.S.C. §1961) from June 1, 1996 through August 28, 2000 equals $454,785.00;

WHEREAS this Judgment being submitted by counsel for AT&T Corp. for entry;

IT IS on this 18th day of September 2000,

ORDERED that a final judgment be and the same is hereby entered in favor of defendant AT&T Corp. and against plaintiff 800 Services, Inc. in the sum of $2,237,434.60.

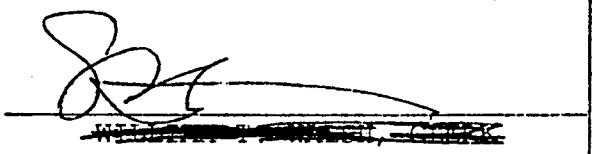

EXHIBIT C

AT&T CORP., Plaintiff, -against- PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC.; PAB GROUP, INC.; AND ENTERPRISE TELCOM SERVICES, INC., Defendants.

98 Civ. 6133 (LAP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1999 U.S. Dist. LEXIS 13108

August 24, 1999, Decided
August 26, 1999, Filed

DISPOSITION: **[*1]** AT&T's petition to confirm arbitration award granted in its entirety and cross-petition denied in its entirety. AT&T's motion for sanctions denied in its entirety.

COUNSEL: For AT&T CORP., plaintiff: Elizabeth M. Sacksteder, Sidley & Austin, New York, NY.

For PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., PAB GROUP, INC., ENTERPRISE TELCOM SERVICES, INC., defendants: Richard C. Yeskoo, Fabricant & Yeskoo, New York, NY.

For PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., counter-claimant: Richard C. Yeskoo, Fabricant & Yeskoo, New York, NY.

For AT&T CORP., counter-defendant: Elizabeth M. Sacksteder, Sidley & Austin, New York, NY.

JUDGES: LORETTA A. PRESKA, United States District Judge.

OPINION BY: LORETTA A. PRESKA

OPINION

MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiff AT&T Corp. ("AT&T") was awarded twenty-six million dollars against defendant Public Service Enterprises of Pennsylvania, Inc. ("**PSE**") at the conclusion of a month-long arbitration proceeding. AT&T now moves to confirm the arbitration award, and defendant **PSE** cross-moves to vacate the award. Defendants PAB Group, Inc. ("PAB") and Enterprise Telcom Services, Inc. ("ETS") separately **[*2]** respond to AT&T's petition to confirm the arbitration award. For the reasons that follow, AT&T's petition to confirm the arbitration award is granted in its entirety, and the cross-petition denied in its entirety. [1]

1 The following submissions have been considered in resolving this motion: Notice of Plaintiff AT&T Corp.'s Petition to Confirm Arbitration Award dated September 28, 1998, with annexed Affidavit of William Nissen ("Nissen Aff.") and Proposed Order; Memorandum of Law in Support of Plaintiff AT&T Corp.'s Petition to Confirm Arbitration Award dated September 28, 1998; Notice of Petition and Petition to Vacate Arbitration Award dated October 30, 1998; **PSE's** Combined Memorandum in Support of Petition to Vacate Arbitration Award and in Opposition to AT&T's Petition to Confirm Arbitration Award dated October 30, 1998 ("**PSE** Mem."); Affirmation of John E. Andrews in Support of **PSE's** Combined Memorandum in Support of Petition to Vacate Arbitration Award and in Opposition to AT&T's Petition to Confirm Arbitration Award dated October 30, 1998 ("Andrews Aff.");

Memorandum of Defendants PAB Group, Inc. and Enterprise Telcom Services, Inc. in Response to AT&T's Petition to Confirm Arbitration Award dated October 30, 1998; AT&T Corp.'s Reply to the Memorandum of Defendants PAB Group, Inc. and Enterprise Telcom Services, Inc. in Response to AT&T's Petition to Confirm Arbitration Award dated November 23, 1998; AT&T Corp.'s Combined Reply in Support of its Petition to Confirm Arbitration Award and in Opposition to **PSE's** Petition to Vacate Award dated November 23, 1998; Affidavit of Aryeh Friedman dated November 19, 1998; Affidavit of William J. Nissen in Support of AT&T Corp.'s Combined Reply in Support of its Petition to Confirm Arbitration Award and in Opposition to **PSE's** Petition to Vacate Award dated November 23, 1998 ("Nissen Reply Aff."); **PSE's** Reply Memorandum in Support of Petition to Vacate Arbitration Award dated December 21, 1998; Reply Affirmation of John E. Andrews in Support of **PSE's** Memorandum in Support of Petition to Vacate Arbitration Award dated December 21, 1998.

[*3] BACKGROUND

This action originated in a series of disputes including but not limited to three federal court actions and seven administrative proceedings before the Federal Communication Commission ("FCC"). (Nissen Aff. P 3). For purposes of this petition, I will briefly discuss the underlying claims.

AT&T is a common carrier regulated by the Federal Communications Commission ("FCC") under the Communications Act of 1934 ("the Act"). *47 U.S.C. § 151, et seq.* **PSE** is a reseller of long distance services which purchases bulk long distance service from carriers such as AT&T. In the early 1990's, AT&T developed an inbound service called the customer specific term plans ("CSTP II plans") for the provision of telecommunications services by AT&T to customers such as **PSE.** The CSTP II plans provided significant discounts and other promotional credits to customers willing to commit to purchase a minimum dollar value of inbound 800 service over a stated term. (Nissen Reply Aff., Ex. D, testimony of Kurth at 3500-03; Testimony of Carpenter at 2696:4-25 attached at Andrews Aff.). Governed by an AT&T **tariff**, if the customer failed to meet its purchase commitment in **[*4]** any year during the life of the plan, it was required to pay AT&T the difference, otherwise referred to as the **shortfall**, between the volume to which it had committed and the amount it had actually taken. (*See* Nissen Reply Aff., Ex. H, AT&T 313, § 3.3.1.Q.3). The provision at issue, entitled "Penalty for **Shortfalls**," provided that:

> the Customer must meet the net annual revenue commitment after the discounts are applied. If a Customer does not meet the annual revenue commitment in any one year, after discounts are applied, the Customer must pay the difference between the Customer's actual billed revenue and the annual revenue commitment.

(Andrews Aff., Ex. C, AT&T 313 P 3.3.1.Q.3). **PSE** claims that AT&T's subsequent actions caused CSTP II plans to become non-competitive and, thus, **PSE** fell into **shortfall. (PSE** Mem. at 3). **PSE** further claims that the total **shortfall** penalties of $ 91,289,789 bore no relation to any actual damage to AT&T as a consequence of **PSE's** failure to satisfy contractual commitments. (*Id.* at 4).

In late July 1996, the parties agreed to resolve their various claims against each other in an arbitration proceeding **[*5]** presided over by a jointly-selected panel of three former federal judges. (Nissen Aff., Ex. A; Andrews Aff., Ex. A). [2] The parties executed an Arbitration Agreement (the "Agreement") which provided, *inter alia*, that all proceedings were stayed, that the arbitration would be governed by the Federal Arbitration Act ("FAA") and that the arbitrators would "determine the rights and obligations of the Parties according to the Communications Act of 1934, 47 U.S.C. P [151], *et seq.*, applicable federal and state **tariffs**, and such other federal and state law as the Tribunal finds would apply in the United States District Court for the Southern District." (Nissen Aff., Ex. A, P 11.3; Andrews Aff., Ex. A, P 11.3).

2 The judges included Sherman G. Finesilver, formerly Judge of the United States District Court for the District of Colorado, George C. Pratt, formerly Judge of the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit, and Thomas Masterson, formerly Judge of the United States District Court for the Eastern District of Pennsylvania. (Nissen Aff. P 7). I note that Judge Finesilver replaced Kenneth Conboy, formerly Judge of the Southern District of New York, because **PSE** elected to accept Judge Conboy's offer to withdraw upon discovering that his firm was representing telecommunications clients in proceedings adverse to AT&T. (*Id.* P 8).

[*6] The evidentiary hearing commenced on May 4, 1998 and lasted through June 3, 1998. (Nissen Aff. P

21). The parties agreed, and the Agreement provided that "the Award shall be made . . . without findings as to facts, issues or conclusions of law, and shall be without a statement of the reasoning on which the award rests." (Nissen Aff., Ex. A, P 6.1; Andrews Aff., Ex. A., P 6.1). The Agreement further provided that "if the Tribunal finds that each party is liable to the other for damages, the Award shall grant net damages to the Party that is liable for the lesser amount, which party shall be the Prevailing Party." (*Id.*). AT&T submitted damage claims to the arbitrators totaling $ 94,103,493, and **PSE** asserted claims ranging from $ 72 million to $ 127 million. (AT&T 901, **PSE** 1006-1008, **PSE** 1221 attached at Andrews Aff.). On August 14, 1998, after the panel heard oral argument on post-hearing briefs, the arbitrators awarded AT&T twenty-six million dollars against **PSE.** (Nissen Aff. P 27, Ex. D). Under the Agreement, an award of less than thirty million dollars was final and binding on the parties. (*Id.* P 29). The arbitrators did not award AT&T any recovery against ETS **[*7]** or PAB.

DISCUSSION

I. *Standard of Law*

The standard for avoiding summary confirmation of an arbitration award is very high, and the burden of proof is on the party moving to vacate the award. *Willemijn Houdstermaatschappij v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997)*. It is well-settled in this Circuit that "'arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Id.* (quoting *Folkways Music Publishers v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993))*. Thus, because of the severe limitation of a court's function in confirming or vacating an arbitration award, a district court must find that the arbitrators acted "in manifest disregard of the law" to vacate an arbitration award. *Id.* (citing *Wilko v. Swan, 346 U.S. 427, 436-37, 74 S. Ct. 182, 187-88, 98 L. Ed. 168 (1953))*. A finding of manifest disregard requires

> something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law. Manifest **[*8]** disregard of the law may be found . . . if the arbitrator understood and correctly stated the law but proceeded to ignore it.

Id. (internal citations omitted).

Arbitrators are not required to provide an explanation for their decision. *United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598, 80 S. Ct. 1358, 1361-62, 4 L. Ed. 2d 1424 (1960)*. Here, the parties agreed that no explanation was to be provided to the parties, and none was. While the lack of an explanation makes the evaluation of the conduct and conclusions of an arbitration panel more difficult, it does not change the standard of law I must apply. *See Willemijn Houdstermaatschappij, 103 F.3d at 12*. Thus, "a reviewing court can only infer from the facts of the case whether 'the arbitrator[s] appreciated the existence of a clearly governing legal principle but decided to ignore or pay no attention to it.'" *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986))*. The Court of Appeals warns the reviewing court to "proceed with caution," (*id. at 13*), because if there is "even a barely colorable **[*9]** justification for the outcome reached," confirmation of the award is required. *Id.* (quoting *Matter of Andros Compania Maritima, S.A. of Kissavos, 579 F.2d 691, 704 (2d Cir. 1978))*. This applies even if the grounds for the arbitrators' decision are "based on an error of fact or an error of law." *Id.*

II. *Public Policy Exception*

There is a "narrow exception to the deferential approach that generally characterizes judicial review of arbitration awards." *International Brotherhood of Electrical Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 715 (2d Cir. 1998)* (hereinafter "*IBEW*"). A court may refuse to confirm an arbitration award if such award is contrary to "'some explicit public policy' that is 'well defined and dominant.'" *Id.* (quoting *W.R. Grace & Co. v. Local Union 759 et al., 461 U.S. 757, 766, 103 S. Ct. 2177, 2183-84, 76 L. Ed. 2d 298 (1983)*; *see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42-43, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)*; *Newsday Inc. v. Long Island Typographical Union, 915 F.2d 840, 844 (2d Cir. 1990)*. While "it is **[*10]** far from clear . . . where to draw the line in determining whether the public policy allegedly violated is important enough to require . . . vacating an award," courts agree that the line must be drawn somewhere. Thus, this exception is very narrow and is usually, although not exclusively, applied by courts where an award threatens public health and safety. *DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 825 (2d Cir. 1997)* (holding that an arbitrator's erroneous interpretation of federal statutory law does not violate public policy), *cert. denied, 522 U.S. 1049, 118 S. Ct. 695, 139 L. Ed. 2d 639 (1998)*; *Newsday, 915 F.2d at 845* (affirming vacating an award which, if enforced, would violate public policy against sexual harassment in the workplace); *Local 1, Amal. Lithographers of America v. Stearns & Beale, Inc., 812 F.2d 763, 773 (2d Cir. 1987)* (reversing confirmation of arbitration award which sought to bind nonunion workers to a collective bargaining agreement to which

they were not a party); *Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841, 852 (1st Cir. 1997)* (reversing confirmation of **[*11]** award reinstating employee who had failed drug test as being contrary to public policy against performing safety-sensitive jobs while under influence of drugs); *Union Pac. R.R. v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993)* (vacating arbitration award because result was reinstatement of railroad worker to safety-sensitive position). In drawing this line, the Court of Appeals has held that a "result-oriented approach" should "govern a federal court's review of an arbitration award on public policy grounds." *IBEW*, 143 F.3d at 717, 718 (holding that the reinstatement of an employee who altered his urine sample for a drug test did not necessarily violate the "strong public policy in favor of promoting a safe, drug-free working environment in the nuclear power industry").

A. *Application of the Public Policy Exception*

PSE's opposition to summary confirmation of the arbitration award and petition to vacate the award revolves around one issue: whether AT&T's Penalty for **Shortfalls** is violative of public policy and, thus, requires vacatur of the award. AT&T argues, *inter alia*, that **PSE** agreed to arbitrate and is now precluded from attempting **[*12]** to litigate the validity of the **shortfall** charges. Indeed, **PSE** specifically put forth in its post-hearing brief to the Panel that the provision was an unenforceable penalty. (*See* Nissen Reply Aff., Ex. U at 54-56). Thus, AT&T asserts that the arbitrators had a full opportunity to take **PSE's** position into account when formulating their award and, since awards are "subject to very limited review," I should not even entertain **PSE's** challenge. *See Folkways Music Publishers, 989 F.2d at 111*.

Although review of the arbitration award is limited, it is broader than AT&T's interpretation. Judicial economy favors allowing the arbitration to proceed first and then subsequently addressing any public policy concerns thereafter, only if they should arise. "A court cannot . . . bypass the arbitration process simply because a public policy issue may arise." *National Railroad Passenger Corp. v. Consolidated Rail Corp., 282 U.S. App. D.C. 132, 892 F.2d 1066, 1071 (D.C. Cir. 1990)*. Following this approach, if the arbitration came out a certain way, the "court would presumably never have had to address the public policy issue at all." *892 F.2d at 1072*. The reviewing **[*13]** process is limited, however, to some extent. While the Court of Appeals has held that "findings as to questions of law, i.e., public policy questions, are subject to *de novo* review by a district court, an arbitrator's factual findings clearly are not." *IBEW*, 143 F.3d at 725. Accordingly, **PSE** is not precluded by the doctrines of waiver or estoppel from asserting that AT&T's Penalty for **Shortfalls** violates public policy. *Id. at 715*.

B. *Filed **Tariff** Doctrine*

PSE argues that the Penalty for **Shortfalls** violates what it characterizes as the strong historical public policy against contractual penalties for breach of contract. *See Priebe v. United States, 332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. 32 (1947)*. "The law is clear that contractual terms providing for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable." *Leasing Service Corp. v. Justice, 673 F.2d 70, 73 (2d Cir. 1982)*; *John T. Brady & Co. v. Form-Eze Systems, Inc., 623 F.2d 261, 263* (2d Cir.), *cert. denied, 449 U.S. 1062, 66 L. Ed. 2d 605, 101 S. Ct. 786 (1980)* (holding **[*14]** that unlawful penalty clauses are unenforceable). Thus, **PSE** argues that if AT&T's Penalty for **Shortfalls** is disproportionate to any reasonably conceivable damage to AT&T then "public policy deems AT&T's **tariff** provision void as a matter of law." (**PSE** Mem. at 10).

PSE's own language proves the undisputed fact that the provision at issue is *not* a contractual provision, but rather, a **tariff** provision. Accordingly, the filed rate doctrine (or the filed **tariff** doctrine) is applicable. "[A] **tariff**, required by law to be filed, is not a mere contract. It is the law." *Carter v. AT&T, 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967)*; *see also Marcus v. AT&T, 138 F.3d 46, 56 (2d Cir. 1997)* ("federal **tariffs** are the law, not mere contracts"); *AT&T v. City of New York, 83 F.3d 549, 552 (2d Cir. 1996)* ("these federal **tariffs** have the force of law and are not simply contractual"). The Supreme Court has acknowledged the rigidity of this doctrine but "despite the harsh effects of the filed rate doctrine, [has] consistently adhered to it." *Maislin Industries v. Primary Steel, 497 U.S. 116, 128, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990)*. **[*15]** The Supreme Court noted, however, "an important caveat: The filed rate is not enforceable if the [regulating agency] finds the rate to be unreasonable." *Id.* Accordingly, under the filed **tariff** doctrine, courts must give effect to a **tariff** provision unless it has been found to violate the Act. Although the Communications Act does not expressly provide that the FCC has the general power to reject **tariff** filings summarily, courts have inferred this under section 201 of the Act. *See, e.g., Capital Network System v. Federal Communications Commission, 307 U.S. App. D.C. 334, 28 F.3d 201, 204 (D.C. Cir. 1994)*. I note that **PSE** is correct to the extent that "the Commission equates **tariff** filings with contract offers." *Id.* Accordingly, "contract law provides the analytical framework by which *the Commission* assesses a **tariff's** 'justness' and 'reasonableness,'" not the district court. *Id.* (emphasis added); *see also Delta Traffic Service v. Georgia-Pacific Corp., 936 F.2d 64, 66 (2d Cir. 1991)*. In *Maislin Industries v. Primary Steel*, the regulating

agency did not determine that the **tariff** rates were unreasonable, and, on that basis, the Supreme **[*16]** Court held that the rates were presumed reasonable. *497 U.S. at 129, fn 10*. Accordingly, because neither party has brought to this Court's attention a ruling by the FCC declaring the filed **tariff** unreasonable, I presume, for purposes of this decision, that the **tariff** is reasonable and has the force of law.

C. *Other Grounds for Refusal to Vacate Award*

Even if I did not make this presumption, **PSE** has not met its burden in meeting the public policy exception. I note that a court can only refuse to confirm an arbitration award if such award is contrary to "'some explicit public policy' that is 'well defined and dominant.'" *IBEW*, (quoting *W.R. Grace & Co., 461 U.S. at 766*). Although courts have not exclusively limited this exception to cases involving public health or safety, it has rarely been used in a case like the one at bar, which will result only in the payment of money damages from one private party to another. *See, e.g., DiRussa, 121 F.3d at 825* (stating that the public policy exception had been applied to prevent conduct that "is particularly harmful to society and egregious in nature, such as when the conduct required by **[*17]** the award would jeopardize public health and safety"); *Newsday, 915 F.2d at 845*; *Local 1, Amal. Lithographers of America, 812 F.2d at 773*; *Exxon, 118 F.3d at 852*. Thus, even addressing the merits of the public policy at issue, it does not fall within the type of public policy that courts have deemed dominant enough to overturn an arbitration award under the high standard applicable. And in any event, any public policy against enforcing a penalty provision is insufficient to overcome the strong public policy in favor of arbitration. *See In the Matter of Arbitration between Associated General Contractors and Savin Brothers, Inc., 45 A.D.2d 136, 142, 356 N.Y.S.2d 374 (3d Dept. 1974), aff'd, 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975)* (holding that although the award constituted a penalty, the public policy favoring arbitration outweighed the public policy against penalties); *Sweeney v. Morganroth, 451 F. Supp. 367, 370 (S.D.N.Y. 1978)* (confirming the arbitration award "even assuming that the award is a penalty . . . where, as here, the contract expressly provides the arbitrator **[*18]** with power to grant the award").

III. *Manifest Disregard of the Law*

In addition, **PSE** asserts that the arbitrators exceeded their powers under the Agreement and acted in manifest disregard of the law. **PSE** has failed to uphold its burden of establishing that the arbitrators understood and correctly stated a well-defined, explicit, and clearly applicable law but proceeded to ignore it. *Willemijn, 103 F.3d at 12*. In *Multi Communication Media Inc. v. AT&T Corp., 1997 U.S. Dist. LEXIS 5166*, No. 96 Civ. 2679, 1997 WL 188938 (S.D.N.Y. April 18, 1997), a case with a similar "penalty" **tariff** provision at issue, the court did not find the penalty to be unreasonable but denied summary judgement because the district judge determined that under the filed rate doctrine the **tariff** provision *may* require application regardless of New York law. *Id. at *14* (emphasis added). Here, the parties agreed that the arbitration panel did not have to make "findings as to facts, issues or conclusions of law" and should make its determination "without a statement of the reasoning on which the award rests." Thus, the very fact that the court in *Multi Communication Media* opined that the **[*19]** filed rate doctrine *may* trump New York law shows, at a minimum, at least one "barely colorable justification for the outcome reached" in the present matter. *Matter of Andros Compania Maritima, S.A. of Kissavos, 579 F.2d at 704.* [3] Accordingly, I find that the arbitrators did not exceed their authority by acting in manifest disregard of the law and I decline to vacate this award on those grounds.

3 Thus, I need not address AT&T's other hypothetical explanations for the arbitration panel's award.

IV. *PAB and ETS's Response to AT&T Petition*

There is no dispute that the arbitrators awarded AT&T no recovery on its claims against PAB and ETS. AT&T merely objects to the request of PAB and ETS that the award be confirmed only as to them and without specifically asking that the award be confirmed as to **PSE.** I find AT&T's objection frivolous, and, in light of the findings above, the award is confirmed in its entirety.

V. *Immediate Registration*

AT&T claims that **PSE's** assets in New **[*20]** York are insufficient to pay the judgment and, thus, requests permission to register the judgment against **PSE** immediately in other federal districts pursuant to *28 U.S.C. § 1963*. *Section 1963* requires a showing of "good cause" to register judgments of district courts in other districts. Good cause is demonstrated where a judgment debtor lacks assets in the district rendering the judgment but holds assets in another district. *See Woodward & Dickerson v. Kahn, 1993 U.S. Dist. LEXIS 4188, 89* Civ. 6733 (PKL), 1993 WL 106129 (S.D.N.Y.) (citing *Chicago Downs Ass'n v. Chase, 944 F.2d 366, 372 (7th Cir. 1991)*; *Associated Business Tel. Sys. Corp. v. Greater Capital Corp., 128 F.R.D. 63, 68 (D.N.J. 1989)*. AT&T claims that **PSE** does not have sufficient assets in the State of New York to pay the amount of the judgment sought and, to the extent **PSE** has assets that they are

located in the Commonwealth of Pennsylvania and/or other jurisdictions. (Nissen Aff. P 30). AT&T need not show exact evidence of assets, but, under *§ 1963*, I may grant registration upon a "lessor showing." *Associated Business, 128 F.R.D. at 68* (quoting the Commentary **[*21]** to 1988 Revision, *28 U.S.C. § 1963*). Accordingly, in the absence of any objections or contrary evidence by **PSE,** I accept as true the sworn affidavit of AT&T's attorney William J. Nissen and grant AT&T's request.

VI. *AT&T's Motion for Sanctions*

AT&T also moves for sanctions under *Fed. R. Civ. P. 11* against **PSE,** ETS and PAB for (1) **PSE's** allegedly meritless counterclaim, and (2) ETS and PAB's allegedly baseless request that the arbitration award only be confirmed as it relates to their liability to AT&T.

In deciding whether to impose sanctions, a court bears a serious responsibility because sanctions run counter to the American rule that each party should bear its own legal expenses. *See Schlaifer Nance & Co., Inc. v. Estate of Warhol, 7 F. Supp. 2d 364, 372 (S.D.N.Y. 1998)*. Despite the district court's discretion to do so, the Court of Appeals has stated consistently that sanctions should not be imposed lightly. *See Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994)*. The Court of Appeals requires "clear evidence that the challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes, **[*22]** and a high degree of specificity in the factual findings." *Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986)* (internal quotation marks and citations omitted), *cert. denied, 480 U.S. 918, 107 S. Ct. 1373, 94 L. Ed. 2d 689 (1987)*. I note, in particular, that it is common for litigants who lose in arbitrations to be motivated to move for vacatur by a desire to forestall complying with an arbitration award. *See, e.g., In the Matter of the Arbitration Between U.S. Offshore, Inc. and Seabulk Offshore, Ltd., 753 F. Supp. 86, 92 (S.D.N.Y. 1990)*. Nonetheless, I do not find those circumstances are present here.

First, I find that AT&T's objection to the response by ETS and PAB is frivolous. ETS and PAB are under no obligation to ask for confirmation of the award as to **PSE.** Accordingly, because it is undisputed that ETS and PAB do not oppose confirmation of the award, AT&T's motion for sanctions is denied as to these parties. Second, while I find that **PSE's** opposition to AT&T's petition borders on violating the above standard, I do not find that it crosses the line. *See, e.g., International Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 86 (2d Cir. 1996)* **[*23]** (affirming denial of sanctions based on petition to vacate award where argument was "barely non-frivolous"); *W.K. Webster & Co. v. American President Lines, Ltd., 32 F.3d 665, 670 (2d Cir. 1994)* (vacating district court's award of sanctions on petition to vacate arbitration award because "colorable claims" and "plausible arguments" were made); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 47 (2d Cir. 1994)* (affirming denial of sanctions despite showing of "poor judgment" and "sloppy legal work"). As stated above, "it is far from clear . . . where to draw the line" when determining the applicability of the public policy exception. *DiRussa, 121 F.3d at 825*. It is also clear that "'the question of public policy is ultimately one for resolution by the courts.'" *IBEW*, 143 F.3d at 715 (quoting *W.R. Grace, 461 U.S. at 766*). Thus, I do not find that **PSE's** opposition to the arbitration was "entirely without color" even though **PSE** did not prevail. Accordingly, AT&T's motion for sanctions is denied in its entirety.

CONCLUSION

For the reasons stated above, the arbitration **[*24]** award of twenty-six million dollars is confirmed in its entirety, **PSE's** cross-petition is denied in its entirety and AT&T's motion for sanctions is denied in its entirety. Accordingly, the parties are to comply with section 2.6(a) of the Agreement and file within five business days of the date hereof joint motions to dismiss with prejudice the pending proceedings. AT&T shall submit a proposed judgment on five days notice.

SO ORDERED.

Dated: New York, New York

August 24, 1999

LORETTA A. PRESKA, U.S.D.J.